83-968

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

CHARLES STORNIOLO,

Petitioner,

vs.

GINA KAREN FISHING, INC., A Corporation, PACECO, INC., A Corporation, ARTHUR DEFEVER, An Individual, ARTHUR DEFEVER, INC., A Corporation, MORRIS GURALNICK ASSOCIATES, INC., a Corporation,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The issues presented herein are

(1) Whether the presumption of prejudice long recognized by this Court in cases of improper communication between court and jury is applicable where a court officer sua sponte gives a demonstration and answers juror questions during a viewing of the scene of an accident, and where these communications occur not only without the consent of the parties and their counsel but also effectively outside their presence.

(2) Whether notions of waiver should be applied to deny appellate review to a claim of prejudicial misconduct by an officer of the court where the affected party has taken reasonable,

if unsuccessful, efforts to prevent and to protect himself against such irregularity, where the irregularity has resulted in a serious miscarriage of justice, and where in any event the law specifically dispenses with the requirement of an objection to such irregularity.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Charles Storniolo respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the case of Storniolo v. Gina Karen Fishing, Inc., et., et al., 9th Cir. No. 81-5605.

OPINION BELOW

The memorandum opinion of the Court of Appeals is reproduced in Appendix A to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on September 12, 1983. (See Appendix A.) This Petition for Writ of Certiorari is filed within ninety days of that date. (28 U.S.C. §2101(c).) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY OR CONSTITUTIONAL PROVISIONS INVOLVED

The principal statutory provisions are the Jones Act (46 U.S.C. §688), and 28 U.S.C. §1333. Also involved is the Court Reporter Act (28 U.S.C. §753). These provisions are set out in pertinent part in Appendix B hereto.

STATEMENT OF THE CASE

A. Factual Background

The accident out of which this action arises occurred on August 16, 1977, when Petitioner Charles Storniolo, a commercial fisherman in his mid twenties, slipped and fell approximately 15 feet while descending a ladder between the upper engine room deck and the lower engine room deck on the fishing vessel, Gina Karen. Storniolo was acting in the course and scope of his employment as a seaman at the time of the accident, having just commenced his first working day aboard the vessel only minutes before. Storniolo had never been on the subject ladder prior to the fall and had never been below the vessel's main deck. Storniolo believed the cause of his fall to have been a slippery substance on the second or third step of the ladder. Storniolo sustained severe and permanent injuries in the fall, including a broken back.

B. Proceedings Below

1. Storniolo brought suit in the United States District Court for the Southern District of California against his employer, Gina Karen Fishing, Inc., alleging causes of action under the Jones Act (46 U.S.C. §§ 688,) and under the doctrine of unseaworthiness. He also sued Paceco, Inc., builder of the vessel, and Arthur Defever, Arthur Defever, Inc., and Morris Guralnick Associates, Inc., designers of the vessel, on theories of negligent design, negligent construction and strict liability in tort.[1/] Prior to trial, the case was bifurcated, with the issue of liability to be tried separately.

2. At trial of the issue of liability, which was before a jury, Storniolo sought to show unseaworthiness and negligence against the Gina Karen

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[1/] The several defendants pursued a third party action among themselves which is not involved in this Petition.

by establishing the presence of a slippery substance on the subject ladder and the absence of a non-skid surface on the ladder's steps and also by showing improper design and construction of the ladder. Storniolo's case against the remaining defendants focused on negligent and unsafe design and construction of the ladder. The defendants contested Storniolo's showing and in addition sought to establish that Storniolo had been negligent in descending the ladder with his back to it (even though this is a common nautical practice), particularly in light of his unfamiliarity with the vessel, and that his negligence had been the sole or principal cuase of the accident.

3. From the first day of trial, April 14, 1981, the question of a viewing of the ladder and the vessel by the jury was a subject of discussion and dispute.

a. The subject first arose when counsel for the Gina Karen moved for a viewing.

[RT 36.] After some discussion of the need for a viewing [RT 41-52], the trial judge ruled that there could be a viewing with limiting instructions if all counsel stipulated that the jury be accompanied by a magistrate and a reporter. The judge further ruled that the viewing would be of the accident ladder alone, and not other areas of the vessel, and that for safety reasons, among others, the jurors would not be permitted to use the ladder. [RT 52-56.] All counsel stipulated to this procedure. [RT 56.] Counsel for Storniolo then indicated his objection to the taking of any testimony out of the presence of the trial judge, even if a reporter were present. The trial judge agreed with this and ordered that the only communication to occur at the viewing was to be the reading of a prepared statement to the jury. [RT 56-57.]

b. The subject next came up on the morning of April 15, 1981, when the trial judge asked if a reporter was actually needed during

the viewing. When counsel for Storniolo indicated his desire that a reporter be present, the trial judge stated that Storniolo would have to pay for the reporter's time. Counsel for Storniolo expressed some doubt about whether Storniolo should be required to pay and asked for time to consult the applicable rules, in which request the court apparently acquiesced. At this point, the trial judge indicated that the magistrate selected to supervise the viewing was one "Bosun" McCue, and that the magistrate had been told of the plan to supply him with a pre-agreed statement to read to the jury at the scene. [RT 87-88.] This discussion was resumed at noon recess that same day, the judge repeating her earlier statement that Storniolo must pay for the reporter if he wanted one present and suggesting that a reporter would not be "necessary if we have this script that Magistrate McCue will read." Storniolo's counsel insisted in response that he wished to read the applicable rules before committing himself.

[RT 168-169.] Counsel for the Defever defendants then urged that the presence of a reporter might actually encourage undesired conversation and that an appropriate alternative would be to dispense with the reporter and to admonish everyone to remain silent during the viewing. [RT 169.] Counsel for Storniolo agreed with this proposal and all counsel stipulated to forego a reporter on the express understanding that the only oral communication at the viewing would be in the form of the reading of the previously approved script and in addition that all crew members would be kept clear of the area of the ladder during the viewing. [RT 170-171.]

c. On the morning of April 17, 1981, the procedure for the viewing was extensively discussed and at length decided upon. [RT 548-599; 565-566.] In the course of these discussions, the trial judge indicated counsel should meet and prepare the statement to be read by Magistrate McCue, said statement to incorporate all evidentiary

matters to be brought to the attention of the jurors during the viewing and such instructions as that they descend the accident ladder (which turned out to be the only means of reaching the lower engine room) while facing it. [RT 559; 566.] During these discussions, counsel for the Gina Karen several times requested that a crew member be allowed to demonstrate the customary manner of descending the ladder, with his back to it, which request was opposed by counsel for Storniolo and denied by the court on the basis that it would be difficult if not impossible to duplicate the conditions which had existed at the time of the accident. [RT 551-553; 556; 565.]

d. Later, at noon recess that same day, counsel met with the judge in chambers to work out the content of the statement to be read by the magistrate. [RT 678-688.] The statement, as finally settled upon, provided as follows:

> "The ladder above [sic] is the ladder upon which Mr. Storniolo fell. It leads to the lower engine room. You will now descend the ladder face toward the ladder. Note the tape on the floor at the base of the ladder. You are free to look around the engine foom, also, for the relative position of the diesel engines, the electrical panel, the floor plates with finger holes, and other component parts about which you have heard testimony."

[RT 687-688.] At this time, the court prescribed the sequence in which the viewing party would descend the ladder, and ordered that counsel and any parties parties present were to remain on the upper deck to avoid any crowding below, [RT 688-689.]

e. At the end of the court session on April 17, 1981, the trial judge advised the jury that the viewing was to take place and explained the purpose of the viewing. The judge indicated that the viewing would be presided over by "Judge McCue," as the judge identified the magistrate. [RT 795-797.] At this point, it was again reaffirmed that the magistrate would be given a copy of the statement which he would

read during the viewing. [RT 796, 798-799.]

f. The viewing was held as scheduled on the morning of April 21, 1981 [RT 801-804], but it was not held according to plan by any means. While on the vessel, the magistrate, a colorful character with an apparently extensive nautical background, as suggested by the out-of-court sobriquet "Bosun" McCue [RT 87-88], departed from the carefully scripted procedure in several significant particulars:

(1) He refused to read the prepared statement to the jury, instead delivering his own extempore interpretation thereof;

(2) He gave a demonstration of descending the ladder with his back to the ladder, as Storniolo had done; and

(3) He had a running conversation with the jurors and answered their questions while effectively

outside the presence of counsel and the parties, who were standing on the upper engine room deck and could not clearly hear what was being said over the sound of the engines. [CR 119; 125; RT 805-806.]

g. Immediately upon returning to court from the viewing, counsel for Storniolo brought the magistrate's departure from the script to the court's attention, stating as follows:

> "Mr. Harrison: The magistrate had conversations with members of the jury, out of earshot of counsel. In terms of the actual written statement, it was not read. He somewhat ad libbed. There were questions that were asked. I heard some explanations to some of the questions and not as to others. We were up above in the upper engine room, so we were not able to really completely hear all of what was said.
>
> I know he did nothing intentionally malicious to anybody for any reason, but I am concerned that he may have made statements. I am concerned that he did make statements that should be stricken from the Jury's

minds with respect to what they consider as evidence.

Additionally, he gave a demonstration on the descending of the ladder, which, you know, counsel -- he just did it. In response to a question somebody said -- one of the jurors said, 'Now, is it safer to go down backwards or forwards?' And he started to answer, and I summoned him up, and I explained to him that the reason -- that all he was to say was the reason they were going down the way they were was by order of the court, period, and it was for their own safety, and he went down, and he came back up, and he did a number down the ladder.

I don't know what he said. I'm not sure what all went on. I now, in retrospect, wish I did take the court reporter. That is my fault, not yours. I guess, for the record, I should move for a mistrial, on the grounds that evidence has been taken out of the presence of the court by the jury. I don't know what it's -- the problem is I don't know if its prejudicial."
[RT 805-806.]

To this the court responded that counsel had adequately preserved his record and that the court would take the matter under submission until counsel had been able to speak with the court's law clerk, who had been present at

the viewing as a bailiff. [RT 806-807.]

h. At a conference in chambers at the start of the afternoon session, counsel advised the court that the law clerk had not seen or heard what had transpired at the foot of the ladder, and that the motion for mistrial would be withdrawn, "[b]ut I would like an admonition. . ." [RT 868.] Following further discussion of the problem, the court stated that

> ". . . I think we can put a cautionary in there, that they could consider what they saw in the engine room, and their observations of the stairs in question, but any comments that might have been made that they overheard from any source are not to be considered as evidence."

[RT 869.] This proposed solution drew the assent of all counsel. [RT 869.]

i. Subsequently, when jury instructions were discussed and settled upon, the meat and sinew of the proposed admonition were unaccountably left out [RT 1279-1223], so that instead of being told specifically to ignore all that

Magistrate McCue had said, the jury was told merely that

> "Anything you may have seen or heard outside the court room is not evidence and must be entirely disregarded. An exception to this is the visit which you took to the Gina Karen. As to this, you may consider that which you observed aboard the vessel."
> [RT 1789.]

Believing that he had already adequately made his record on the point, counsel for Storniolo did not raise a formal objection when the court asked, before the jury retired, whether counsel had any objections not previously noted. [RT 1818.]

4. Ultimately, the jury returned a defense verdict [CR 118], and judgment was entered thereon [CR 124].

Storniolo moved for a new trial on the basis, inter alia, that he had been prejudiced by the irregularities which occurred during the viewing. In support of his motion Storniolo introduced the declarations of his counsel who

indicated that although counsel had personally reviewed the ground rules with Magistrate McCue before the jurors had boarded the vessel, including the manner in which the ladder was to be descended and the necessity for sticking to the prepared text, Magistrate McCue had not read the statement and had begun a virtual nonstop dialogue with the jurors from the moment all were assembled on the lower deck, evidently answering juror questions and volunteering information not contained in the prepared statement; that the magistrate had ignored counsel's objections and attempts to presuade him to adhere to the scenario; that in response to a juror question about the safest way to descend the ladder, the magistrate had given a demonstration of descending with his back to the ladder; and that the magistrate's running commentary continued even after the jury had ascended to the main deck. [CR 119, pp. 3-8; CR 125, pp. 15-17.]

In opposition, the Gina Karen introduced the declaration of its counsel, who admitted that Magistrate McCue had descended the ladder with his back to it and that Magistrate McCue had not read the prepared statement. Counsel stated, however, that he had not heard a juror ask nor had he heard Magistrate McCue say which way was the safest way to descend the ladder. He further indicated that none of the conversation in the lower engine room had been audible and that counsel for Stroniolo had not, to his observation, objected to any of the proceedings. [CR 122, pp. 1-5.]

Storniolo's motion for a new trial was denied. [RT 1845-1855.]

5. An appeal was taken to the Ninth Circuit Court of Appeals [CR 131], which held in an unpublished memorandum opinion filed on September 12, 1983, that the misconduct of the magistrate was not presumptively prejudicial, and that Storniolo had failed to sustain his

burden of establishing prejudice; that in any event Storniolo had waived the issue by withdrawing his motion for mistrial; and that the absence of a reporter's transcript of the viewing did not alter the situation, since Storniolo had waived the presence of a reporter. (See Appendix A.)

6. The District Court had jurisdiction of the cause pursuant to the Jones Act (46 U.S.C. §§ 688), and 28 U.S.C. §1333. The Court of Appeals had jurisdiction of the appeal under 18 U.S.C. §1291.

REASONS FOR GRANTING THE WRIT

A. The Controlling Decisions of This Court Require That a Presumption of Prejudice Be Indulged Where There Is Improper Communication Between Court and Jury. The Decision of the Court of Appeals Represents an Erosion of This Salutory Principle, Requiring the Intervention of This Court

The leading case on the subject of improper communication between court and jury is Fillippon v. Albion Vein Slate Co. (1919) 25 U.S. 76. In that case, which involved a supplemental jury instruction given without notice to the parties of their counsel and in their absence, this Court stated as follows:

> "We entertain no doubt that the orderly conduct of a trial jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict. Where a jury has retired to consider their verdict, and supplementary instructions are required, either because

> asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present . . . . In this case the trial court erred in giving a supplemental instruction in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction. . . ."
> (250 U.S., at p. 81.)

The Court later went on as follows:

> "And, of course, in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless."
> (250 U.S., at p. 82; emphasis added.)

Fillippon was a civil case, but the holding therein, including the requirement that a presumption of prejudice be indulged, has been followed in numerous subsequent cases, both civil and criminal, and in a variety of factual contexts. (See, e.g., United States v. Burns (CA 7th, 1982) 683 F.2d 1056, 1058-1059; Standard Alliance Ind. v. Black Clawson Co. (CA 6th, 1978) 587 F.2d 813, 828-829; Blue Bird Body Co. v. Ryder

Truck Rental (CA 5th, 1978) 583 F.2d 717; Petrycki v. Youngstown & Northern Arco (CA 6th, 1976) 531 F.2d 1363, 1366-1368; United States v. Gay (CA 6th, 1975) 522 F.2d 429, 435; Rice v. United States (CA 8th, 1966) 356 F.2d 709; 716-717; Wheaton v. United States (CA 8th, 1943) 133 F.2d 522, 527.)

Indeed, this Court has itself subsequently followed Fillippon and applied it in criminal cases, some quite recent. (United States v. United States Gypsum Co. (1978) 438 U.S. 422, 459-462; Rogers v. United States (1975) 422 U.S. 35, 38; (see also Shields v. United States (1927) 273 U.S. 583.)

In addition, a number of cases have applied the Fillippon rationale to situations involving other communications than ex parte supplemental instructions during deliberations. (See e.g., Remmer v. United States (1954) 347 U.S. 227 [apparent offer of bribe to juror); Mattox v. United States (1892) 146 U.S. 140, 148-150 [comments of bailiff, newspaper article];

Krause v. Rhodes (CA 6th, 1977) 570 F.2d 563; cert. den. 435 U.S. 924 [threats on life of juror]; Richardson v. United States (CA 5th, 1966) 360 F.2d 366 [conversation between government witness and juror]; United States v. Harry Barfield Company (CA 5th, 1966) 359 F.2d 120 [president of defendant corporation in tax case engaged in social conversation with jurors during trial]; United States v. Gersh (CA2d, 1964) 328 F.2d 460 [anonymous phone calls to juror]; Texas & New Orleans Railroad v. Underhill (CA 5th, 1956) 234 F.2d 620 [comments of courtroom spectator]; Paramount Film Distributing Corp. v. Applebaum (CA 5th, 1954) 211 F.2d 188 [jury considered manual not received in evidence].) Many of these cases, and others as well, are collected in Government of Virgin Islands v. Gereau (CA 3d, 1975) 523 F.2d 140, 150-154, as instances of "extraneous influence" which present a sufficiently high potential for prejudice that they are considered prima facie prejudicial, so that the

burden on the issue of prejudice rests on the responding party, not the complaining party.

Notwithstanding the foregoing, the portion of the Fillippon holding which establishes the rebuttable presumption of prejudice where improper communication has occurred has been disregarded by various Courts of Appeals in favor of a test of prejudice which purports to be based on Rule 61 of the Federal Rules of Procedure and which places the burden of establishing prejudice on the complaining party, at least in civil cases. (See, e.g., Skill v. Martinez (CA 3rd, 1982) 677 F.2d 368; Lyons v. Rainier Mfg. Co. (CA 9th, 1979) 594 F.2d 1236, 1237; Dixon v. Southern Pacific Transp. Co. (CA 9th, 1978) 579 F.2d 511, 513-514; Charm Productions, Ltd. v. Travelers Indem. Co. (CA 7th, 1973) 489 F.2d 1092, 1095-1096, cert. den. 416 U.S. 986.) The cases just cited seem to proceed on the theory that the existence of a presumption of prejudice is somehow inconsistent with the requirement of

Rule 61 that error have a substantial effect on the rights of the litigants before a reversal is ordered. In truth, there is no such inconsistency. As this Court observed in McCandless v. United States (1935) 298 U.S. 342, 347-348, a statutory provision requiring that judgment on review be given "without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties," just as Rule 61 now requires, did not change "the well settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial. United States v. River Rouge Co., 269 U.S. 411, 421; Fillippon v. Albion Vein Slate Co., 250 U.S. 76, 82; Williams v. Great Southern Lumber Co., 277 U.S. 19, 26." [Emphasis in original.]

In addition, the cases which disregard the presumption of prejudice seem to treat improper

judge-jury communications as merely a routine irregularity, not meriting any special attention. In Dixon v. Southern Pacific Transp. Co., supra, 579 F.2d 511, 513-514, fn.2, for example, one of the cases on the basis of which the presumption of prejudice was held unavailable to Storniolo, it was stated that

> "[T]here is no reason to treat [improper judge-jury communication] differently than other types of unconstitutional errors in the administration of civil trials."

We think this blithe pronouncement ignores a number of telling considerations. For one thing, if any single person embodies the authority of the law in the eyes of a jury it is the judge or magistrate who presides at the trial. Of all the participants in the trial, the judge is the person whose statements and observations are most likely to be accepted without question by the jurors. When, therefore, a judge (or, as in this case, a magistrate acting as the judge's appointed surrogate) undertakes to give evidence

in the form of a demonstration and answers to jurors' questions, as occurred herein, or merely to supply supplemental instructions, it is inevitable that what he says and does will carry great weight with the jury. In addition, when such communication occurs outside of the presence of the parties and their counsel great difficulty is certain to be encountered in reconstructing what has happened and in assessing its likely effect where only a partial record is made of the communication (see, e.g., United States v. Burns, supra, 683 F.2d 1056, 1058-1059) and a fortiori where, as here, there is no record of the communication available (see United States v. United States Gypsum Co., supra, 438 U.S. 422, 461-462; United States v. Gay, supra, 522 F.2d 429, 433-435). As observed in United States v. Burns, supra, 683 F.2d 1056, 1058-1059, in a slightly different but analogous context:

> "Two important interests are undermined by private discourse between judge and jury during deliberations.

> First, it gives rise to "Star Chamber' implications which detract from the appearance of justice. Second, it absolutely precludes the parties from making a record as to the context in which the judge's remarks were made, thereby thwarting appellate review. . . . An additional concern in this particular case is the risk that the judge will be drawn into an extended discourse with the jury, thereby disturbing the delicate balance of legal principles set forth in the original instructions. . ."

Because Fillippon has never been overruled or limited by this Court (indeed, as seen above, its holding has quite recently been reaffirmed), because it represents a salutary precedent which deserves perpetuation, and because the line of cases relied on by the Court of Appeals herein disregards the principles of Fillippon and creates conflict and confusion in the law, it is respectfully submitted that an authoritative reiteration of the true rule is urgently needed. This is not a matter of mere form or sterile technicality. Rather it is a matter of vital importance to the fair administration of justice.

B. Fundamental Fairness and Sound Public Policy Compel the Conclusion That There Was No Waiver of the Magistrate's Misconduct as a Ground of Appeal

There is a distinctly "Catch-22" quality to the Court of Appeal's determination that Storniolo waived any and all right to raise on appeal the issue of the magistrate's misconduct.

Storniolo's difficulties began with the District Court's announcement that Storniolo would have to pay for a reporter if he wanted one present at the viewing. This was plainly contrary to law. The Court Reporter Act requires that an official court reporter record verbatim all proceedings in civil cases and it requires, further, that the government compensate said court reporters. (28 U.S.C., §753(b) and (e).) Wishing to avoid this additional expense and having been offered a means of protecting his client without the need for a reporter, counsel for Storniolo did indeed waive the presence of

a reporter at the viewing, as the cases indicate it was within his power to do. (See, e.g., United States v. Piascik (CA 9th, 1977) 559 F.2d 545.) Nonetheless, in so doing, counsel by no means consented to what ensued, any more than counsel in United States v. United States Gypsum Co., supra, 438 U.S. 422, 460-461, having acquiesced in the trial judge's ex parte conference with the jury foreman solely to determine the cause of apparent juror confusion, consented to the judge's delivery of a demand for a verdict "one way or the other." Quite the contrary, the elaborately choreographed procedures so laboriously worked out between counsel and the court were specifically designed to prevent anything like the free-wheeling demonstration and question-and-answer session put on by the magistrate.

The second waiver, and the one which is most relevant for present purposes, was a direct consequence of the first. The very eventuality having happened which counsel and the court

had striven to avoid, and the absence of a reporter and the placement of counsel and observers during the viewing having made it impossible to reconstruct precisely what occurred, counsel for Storniolo had only one practical choice. His motion for mistrial had little real chance of success, since the record necessary to support it was lacking. Under the circumstances, the sole means of salvaging the situation, even partially, was an admonition to the jury to disregard Magistrate McCue's remarks. Counsel therefore abandoned the mistrial motion, but only on the clear understanding that a proper and effective admonition would be given.

Once again, however, counsel's reasonable expectations were frustrated, for the admonition ultimately given completely failed to indicate that the magistrate's words and deeds were to be disregarded. The end result was that the jury had before it, and was left entirely free to consider, prejudicial evidence of precisely the kind

counsel had labored heroically from the outset to keep out of the case.

It may perhaps be debated whether counsel preserved his record with the degree of force and clarity which might be wished, but in truth, this was one of those cases in which there was little that could be done to prevent probable serious prejudice, short of declaring a mistrial, which would, of course, have necessitated the very retrial now sought. Since the main purpose of timely objections is to permit prompt resort to such remedies and palliatives as may be available, so that retrial may be avoided, it follows that where no effective remedy is available and where the error causes a manifest miscarriage of justice, there should be no overly punctilious insistence on mere form. (See Citron v. Aro Corporation (CA 3d, 1967) 377 F.2d 750, 753; Pritchard v. Liggett & meyers Tobacco Company (CA 3d, 1965) 350 F.2d 479, 486, cert. den. 382 U.S. 987.) As this Court observed in Hormel v.

Helvering (1941) 312 U.S. 552, 557, in discussing a similar waiver issue:

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Ordinary rules of procedure do not require sacrifice of the rules of fundamental justice."

Moreover, Rule 605 of the Federal Rules of Evidence provides that "[t]he judge presiding at the trial may not testify in that trial as a witness" and that "[n]o objection need be made in order to preserve that point." As one commentator has noted, this rule applies "whenever the judge testifies, including those instances where the judge testifies without ever being called by a party and where the judge effectively assumes the role of a witness without ever taking the witness stand. [Emphasis added.]" (Graham,

Handbook of Federal Evidence (West, 1981), §605.1.) And the rule beyond any question encompasses a magistrate temporarily presiding in the place and stead of the judge. (See Kennedy v. Great Atlantic & pacific Tea Co. (CA 5th, 1977) 551 F.2d 593 [Presiding judge's law clerk within scope of rule].) If no objection whatsoever is required, it is difficult to see how in law or logic a defective objection or a withdrawn objection can give rise to a waiver. Nonetheless, the decision of the Court of Appeals herein in effect so holds.

CONCLUSION

This case prsents issues of the first importance not only to the parties to this lawsuit but to litigants generally. Traditionally, the courts, including this Court, have been scrupulous to protect juries against extraneous influences such as improper communications from the trial

judge, and they have recognized that the potential for prejudice when such improper communications occur is altogether too great for ordinary standards of review to apply. The decision of the Court of Appeals herein and the cases on which that decision relies constitute a significant departure from that traditional approach. The willingness of the Court of Appeals to find a waiver of this point likewise runs counter to firmly established principles of law. Counsel took all reasonable steps to protect his record, and even if he did not, this case involves an egregious miscarriage of justice of the sort the courts have consistently held justifies review of points not properly preserved by appropriate objection. Moreover, the Federal Rules of Evidence specifically dispense with any need to make any objection to what amounts to testimony by a judicial officer in a case in which he is presiding.

Because these issues are of such importance and because the manner in which the Court of

Appeals has treated them threatens a serious erosion of principles carefully enunciated by this Court, it is respectfully urged that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

GERALD H. B. KANE, JR.

JEFFREY B. HARRISON

Attorneys for Petitioner

APPENDIX A

NOT FOR PUBLICATION

FILED
SEP 12, 1983

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES STORNIOLO, Plaintiff-Appellant, vs. GINA KAREN FISHING, INC., a corporation, et al, Defendant-Appellee.	NO. 81-5605 D.C. No. CV 78-0601-K
GINA KAREN FISHING, INC., a corporation, Third Party Plaintiff-Appellant, vs. PACECO, INC., a corporation, et al, Third Party Defendant-Appellees	No. 81-5709 D.C. No. CV 78-0601-K MEMORANDUM

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, District Judge, Presiding
Argued and submitted, June 6,1983

Before: PREGERSON and NELSON, Circuit Judges,
and CORDOVA* District Judge

Appellant, plaintiff below, brought an action for injuries he sustained while serving as a seaman on the fishing vessel Gina Karen. After trial by jury, a verdict was returned in favor of all defendants. The trial court denied a motion for new trial and plaintiff here appeals. We affirm.

Appellant first contends that the conduct of a magistrate who accompanied the jury on a visit to the vessel Gina Karen is grounds for a new trial. Appellant has made no showing how he was prejudiced by the alleged misconduct of the magistrate. Assuming that the magistrate's conduct was improper, the court does not agree with appellant's argument that all improper judge-jury communications are presumptively prejudicial. Skill v. Martinez, 677 F.2d 368 (3rd Cir. 1982);

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* The Honorable Valdemar A. Cordova, United States District Judge for the District of Arizona, sitting by designation

Dixon v. Southern Pacific Transportation Co., 570 F.2d 511 (9th Cir. 1978).

In any case, the court does not find it necessary to rule on that issue. The record reveals that appellant made a motion for mistrial based on the magistrate's alleged misconduct and then withdrew the motion. By withdrawing the motion for mistrial, appellant abandoned or waived any objections he may have had because of the alleged misconduct. A party may not fail to pursue an objection to alleged error during the trial as a matter of trial strategy and then seek a new trial because of the error. Porterfield v. Burlington Northern, Inc., 534 F.2d 142 (9th Cir. 1976).

Appellant claims error because of the absence of a court reporter on the jury's visit to the Gina Karen. The record, however, shows that appellant validly waived the reporter's presence.

Appellant next claims that the circumstances surrounding the qualified expert instructions gave rise to reversible error. The court finds that the

trial court's qualified expert instruction was correct and that any error occasioned by the trial court's altering the instruction after closing argument was harmless.

Appellant also argues that the trial court erroneously gave a laches instruction. Appellant is correct that the three year Jones Act limitation is the analogous period, Bush v. Oceans International, 621 F.2d 207 (5th Cir. 1980), and that the existence of laches is a question for the court, Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1982). However, the trial court did not decide if a verdict on laches would be binding or merely advisory. Instead, the trial court found that the jury's verdict on the merits of the liability claim mooted the issue. In so doing, the court did not commit reversible error.

Finally, the alleged combination of errors below did not deny appellant a fair trial.

AFFIRMED

Consolidated Case No. 80-5709:

The trial court correctly found that Gina Karen's third party complaint for indemnity was made moot by the jury's verdict in favor of defendants of liability.

AFFIRMED.

APPENDIX B

ADDENDUM

46 U.S.C. §688 provided as follows at the times relevant hereto:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

28 U.S.C. §1333 provides as follows:

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize."

28 U.S.C. §753 provided in pertinent part as follows at the times relevant hereto:

"(b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means which may be augumented by electonic sound recording subject to regulations promulgated by the Judical Conference: (1) all proceeding in criminal cases had in open court; (2) all proceedings in other cases had in open court

unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding. The Judicial Conference shall prescribe the types of electronic sound recording means which may be used by the reporters....

* * *

(e) Each reporter shall receive an annual salary to be fixed from time to time by the Judicial Conference of the United States. All supplies shall be furnished by the reporter at his own expense."